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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 638

JUW TEN, also known as GEORGE K. JUE, also known as JUE GAR KING, also known as CHOW KA KING,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

JOSEPH S. HERTOGS,
580 Washington Street,
San Francisco 11, California,
Attorney for Petitioner.

FRED CAMPAGNOLI,
300 Montgomery Street,
San Francisco 4, California,
Of Counsel.

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The petitioner, Jew Ten, also known as George K. Jue, also known as Jue Gar King, also known as Chow Ka King, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the administrative order of deportation.

OPINIONS BELOW

The decision of the Board of Immigration Appeals ordering petitioner's deportation from the United States is printed in Appendix A hereto, infra, pp. i-vi. The opinion of the Court of Appeals, printed in Appendix B hereto, infra, pp. vii-xiv, is reported in 307 F.2d 832.

JURISDICTION

Judicial review of the final order of deportation was sought under Public Law 87-301 (8 U.S.C.A. 1105a). The judgment of the Court of Appeals was filed and entered on September 8, 1962, Appendix B, infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the judicial recommendation against deportation under Section 241(b)(2), made and entered by the District Court following conviction of a criminal offense, bar petitioner's deportation based on the same criminal misconduct?

STATUTES INVOLVED

Section 241(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(4)).

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined

therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."[1]

[1]The last sentence was added by the Act of September 26, 1961, 75 Stat. 655, 8 U.S.C.A. 1251(b).

STATEMENT OF THE CASE

Petitioner is an alien, a native and citizen of China who was lawfully admitted to the United States in 1919, when approximately 11 years of age, as a lawful minor son of a domiciled merchant. He last entered the United States at the Port of Honolulu, the then Territory of Hawaii, on August 10, 1950, at which time he was admitted as a lawful returning permanent resident in possession of a valid reentry permit.

On February 15, 1954, petitioner was charged and convicted of a conspiracy to defraud the United States of its governmental function and right of administering the immigration laws of the United States by knowingly, wilfully and unlawfully aiding, assisting and abetting aliens to enter or try to enter the United States in violation of law. At the conclusion of the criminal proceeding, after proper notice and within the period of time prescribed by statute, the District Court, pursuant to Section 241(b)(2) of the Immigration and Nationality Act (8 U.S.C.A. 1251(b)(2)), entered an order of recommendation to the Attorney General that petitioner "be not deported".[2]

On April 3, 1954, the District Director of the Immigration and Naturalization Service issued a warrant of arrest charging that petitioner was subject to deportation under Section 241(a)(13) of the Immigration and Nationality Act (8 U.S.C.A. 1251(a)(13)), in that prior to or at the time of any entry or at any time within five years after any entry he did

[2]Said order is set forth in Appendix C, infra, pp. xv-xix.

knowingly assist, aid or abet another alien to enter or try to enter the United States in violation of law.[3]

After an extensive hearing, the Special Inquiry Officer, in a decision dated July 18, 1955, sustained the charge and directed that petitioner be deported from the United States. This decision was affirmed by the Board of Immigration Appeals on December 20, 1955, Appendix A, infra, pp. i-vi.

The deportation order is based on the same incidents and facts as developed during the course of the criminal proceeding. In substance the essential facts upon which the deportation order is predicated are the same essential facts upon which the criminal proceeding was founded.

The petition for review was filed in the Court of Appeals for the specific purpose of seeking a judicial determination as to whether the administrative decision is erroneous as a matter of law.

REASONS FOR GRANTING CERTIORARI

1. This writ of certiorari is sought because the issue presented herein raises an important and substantial question pertaining to the administration of the immigration and nationality laws of the United States. The decision below appears to be in direct conflict with other decisions of this Court.

This Court stated in *Bonetti v. Rogers*, 356 U.S. 691, when interpreting another section of the same Act, at page 699:

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[3] The warrant of arrest is set forth in Appendix D, infra, pp. xx-xxi.

"* * * we believe that our interpretation of them is the only fair and reasonable construction that their cloudy provisions will permit under the rare and novel facts of this case. 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment.' Bell v. United States, 349 US 81, 83."

This Court likewise stated in the case of *Fong Haw Tan v. Phelan*, 333 U.S. 6, at page 10:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 US 388, ante, 17, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The Court below, when considering the effect of a sentencing Court's recommendation that a convicted alien not be deported, stated:

> "But, as read and applied by some courts, § 241(b) was not free from ambiguity. The ambiguity in the scope of the application of § 241(b) resulted from first, the vague and uncertain language (here acknowledged to be so by respondent) of § 241(a)(4), and secondly, because for a number of years sentencing courts made judicial recommendations against deportation in cases where aliens were convicted of a violation of the narcotics laws—even though aliens convicted of violations of narcotics laws were specifically deportable under § 242(a)(11)." (Appendix B, infra, pp. vii-xiv, 307 F.2d 832, 834.)

The language of subsection 241(b)(2) as originally enacted in the Immigration and Nationality Act of 1952 was adopted from what was originally Section 19 of the Immigration Act of 1917, 39 Stat. 889, as amended in former Section 8 U.S.C.A. 155(a). The provisions of that part which were carried forth into the new Section 241(b) were not limited in any way whatsoever. The first limitation appears in Section 301(c) of the Narcotic Control Act of 1956 (70 Stat. 575), at which time Congress amended Section 241(b) of the Immigration and Nationality Act by adding the last sentence thereto which reads as follows:

> "'The provision of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

The Congressional intent of this amendment is clear from its history. In Conference Report No. 2546, the managers of the bill said:

"(3) It amended Section 241(b) of that act by including additional language to state clearly that this provision does not permit judicial recommendation against deportation of an alien convicted of a narcotic offense. Clarification of this provision has been made desirable by reason of the decisions in United States ex rel. De Luca v. O'Rourke (213 F.2d 759) and Ex Parte Robles-Rubio (119 F.Supp. 610)."

(2 U.S. Cong. News '56, p. 3321.)

The above Congressional action clearly expresses through such amendment a manifestation that the beneficial provisions of Section 241(b) shall not apply in the case of an alien subject to deportation under the provisions of subsection (11) of Section 241(a). This Congressional declaration, by the expressed exclusion of subsection (11), makes it obvious that the provisions of Section 241(b) are applicable to all other subsections of Section 241(a). If it had been the intention of Congress to specifically exclude such a judicial recommendation against deportation under subsection (13), (the subsection involved here), Congress would have so specifically stated. The maxim *expressio unius est exclusio alterius* is applicable and should be applied in interpretation of the statute involved.

For about a half a century Congress has seen fit in deportation cases to give complete recognition to the historic concept of pardons as well as providing additional relief where there has been an appropriate judicial order of recommendation against deportation.

The decisions below repudiate such judicial clemency by attacking indirectly what it can not attack directly. This construction of the statutory provisions here involved is repugnant to the announced dictates of this Court with regard to interpretation of deportation statutes.

2. The decision of the Court below in the instant case is directly in conflict with the decisions of the Court of Appeals for the Third Circuit in *United States v. Hughes,* 116 F.2d 613, and *Rasmussen v. Robinson,* 163 F.2d 732.

In *United States v. Hughes,* supra, the Court held, when considering the effect of a judicial recommendation under Section 19 of the Immigration Act of 1917, as amended, (formerly 8 U.S.C.A. 155), at page 616, that a judicial recommendation against deportation was mandatory.

In *Rasmussen v. Robinson,* 163 F.2d 732, at page 734, the Court stated that:

> "* * * the statute provides that the recommendation shall be made to the 'Attorney General.' The 'Attorney General' referred to is the Attorney General of the United States. The 'recommendation' is mandatory upon him.
>
> * * * * *
>
> "We can perceive no lack of logic in this view. Congress intended to confer and did confer upon our 'local' judges the power to recommend whether or not an alien should be deported for a crime involving moral turpitude committed within the United States. * * *"

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
December 4, 1962.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

FRED CAMPAGNOLI,
Of Counsel.

(Appendices A through D Follow)